IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 23RD AUGUST 2007 / 1ST BHADRA 1929

WP(C).No. 19747 of 2007(A)

CMA.10/2007 of SUB COURT, VADAKARA
OS.165/2006 of MUNSIFF COURT, VATAKARA

.....

PETITIONER: APPELLANT

KARIATT KUKNHAMMED HAJI,
S/O. AVULLAKUTTY, AGED 78 YEARS, TRADER,
AYANCHERI AMSOM, DESOM, POST THAROPOYIL,
VATAKARA TALUK, KOZHIKODE DISTRICT.

BY ADV. SRI.B.KRISHNAN
SRI.R.PARTHASARATHY

RESPONDENTS: RESPONDENTS

---

1. ASARIKANDY MOIDU, S/O. ABDULLA,
AGED 50 YEARS, TRADER, AYANCHERI AMSOM, DESOM,
POST AYANCHERI, VATAKARA TALUK, KOZHIKODE DISTRICT

2. SON FAISAL, AGED 33 YEARS,
TRADER, AYANCHERI AMSOM, DESOM, POST AYANCHERI,
VATAKARA TALUK, KOZHIKODE DISTRICT.

BY ADV. SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.K.JAYAKUMAR
SRI.P.B.KRISHNAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

Petitioner's Exhibits:-

Ext.P1:- A true copy of the order dismissing IA 1583/2006.

Ext.P2:- A true copy of the affidavit in support of the petition for temporary order of injunction.

Ext.P3:- A true copy of the petition for temporary injunction IA 1583/2006

Ext.P4:- A true copy of the counter affidavit filed by the respondents opposing Ext.P3

Ext.P5:- A true copy of the affidavit in support of the petition IA 824/2007

Ext.P6:- A true copy of the petition IA 824/2007

Ext.P7:- A true copy of the counter affidavit filed by the respondents opposing exhibit P6.

Ext.P8:- A true copy of the plaint filed by the writ petitioner.

Ext.P9:- A true copy of the written statement filed by the respondents.

Ext.P10:- A true copy of the affidavit in support of the petition for issue of commission.

Ext.P11:- A true copy of the petition for issue of commission.

Ext.P12:- A true copy of the commission report dated 8.12.2007.

Ext.P13:- A true copy of the order made by the Subordinate Judge in CMA 10/2007

M.SASIDHARAN NAMBIAR,J.

==========

W.P.(C) NO.19747 OF 2007

==========

Dated this the 23rd day of August, 2007

JUDGMENT

Writ petitioner is the plaintiff and respondents the defendants in the suit. Suit was filed seeking a decree for permanent prohibitory injunction. Plaint schedule property is having a measurement of 8x46 ft. koles. The allegation of writ petitioner was that respondents are attempting to encroach into the plaint schedule property and construct a building therein and they have no right to do so. Ext.P3 application was filed along with the suit seeking an order of temporary injunction under Rule 1 of Order XXXIX of Code of Civil Procedure .An ex parte order of temporary injunction was passed which was prevailing till 8.1.2007. The injunction application was then posted along with the suit and the order of injunction was not extended. Contending that respondents are proceeding with the construction

work and petitioner was not aware of non-extension of the order of injunction, Ext.P6 application was filed on 24.5.2007 seeking an order of temporary injunction restraining respondents from proceeding with the construction. Ext.P7 objection was filed by the respondents. Under Ext.P1 order, learned Munsiff dismissed Ext.P3 application. Ext.P5 application was closed. Writ petitioner challenged Ext.P1 order before Sub Court, Vadakara in C.M.A.10/2007. An order to maintain status quo was passed in the appeal. It was subsisting till the disposal of the appeal. Under Ext.P13 order CMA was dismissed on 20.6.2007. This writ petition was filed on 26.6.2007. An order to maintain status quo was passed on that day. It is operative till 24.8.2007.

2. Learned counsel appearing for petitioner and learned Senior counsel appearing for respondents were heard.

3. The dispute between the parties is with regard to the exact boundary line separating the

plaint schedule property belonging to writ petitioner and property of respondents which lie to the north of the plaint schedule property. Though a Commissioner was appointed in Ext.P11 application, filed by the petitioner Ext.P12 report was filed by Commissioner reporting his inability to identify the plaint schedule property without the assistance of a qualified surveyor. Petitioner did not take steps to provide assistance of a qualified surveyor to the Commissioner. It was taken as a ground by the Munsiff to find absence of a prima facie case on the side of petitioner. Learned Munsiff under Ext.P1 order found that as dispute is with regard to the identity of the properties and petitioner did not get the plaint schedule property identified with the assistance of a surveyor, held that he has not established the prima facie case. When Ext.P3 petition was heard, respondents had undetaken to demolish the structure, in case ultimately the suit is to be decided in favour of the writ petitioner.

Relying on the undertaking learned Munsiff found that the balance of convenience is in favour of respondents and refused to grant an order of temporary injunction. Before the first appellate court it was contended that trial court refused to grant an order of temporary injunction, basing on the undertaking given by respondents. Relying on the decisions of this court it was contended that the order is unsustainable. But first appellate court found that petitioner did not identify the property and therefore he has no prima facie case and Ext.P1 order was not passed solely on the basis of the undertaking but finding that petitioner has not proved a prima facie case.

4. On hearing the learned counsel on both sides, it is clear that the dispute cannot be resolved without proper identification of the plaint schedule property. Neither the trial court nor the first appellate court even prima facie found that the construction which is sought to be prevented by the order of temporary injunction is

within the property belonging to the respondents or is not within the plaint schedule property belonging to the petitioner. On the other hand, order was passed only on the basis that petitioner did not identify the plaint schedule property and prima facie establish that construction is being made in the plaint schedule property belonging to him. In the nature and circumstances of the case, the approach of the courts below is not correct. Unless it is prima facie shown that the construction is made only within the property of respondents, and not in the property belonging to plaintiff respondents cannot be permitted to complete the construction either on the basis of undertaking or on the basis that petitioner did not identify the property. It is more so, because a commission was appointed by the trial court and the Commissioner submitted Ext.P12 report stating that he could not identify the property without the assistance of the surveyor. Trial court should have provided assistance of a qualified surveyor

at the expense of the petitioner. If the petitioner did not comply with that order, refusal to grant an order would have been justified. On the other hand, when the dispute is with regard to the identification of the property in the circumstance of the case courts should not have found a prima facie case for the reason that property is not identified. In such circumstance, Ext.P1 and P13 orders are set aside. Learned Munsiff is directed to appoint Taluk Surveyor, at the expense of the petitioner, to assist the Commissioner with a direction to the Commissioner to submit the report as expeditiously as possible, and at any rate within thirty days from the reopening of the court. The expense for the surveyor is to be met by the petitioner /plaintiff. Learned Munsiff has to pass a final order in I.A.1583/2006 thereafter. Status quo as on 27.6.07 is to be maintained till final order is passed in I.A.1583/2006.

Writ Petition is disposed of as above.

Registry to communicate the judgment to the

learned Munsiff.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006